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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN MATTHEW GOOBIC,

Defendant and Appellant.

C089951

(Super. Ct. No. P13CRF0488)

Appointed counsel for defendant Brian Matthew Goobic has filed an opening brief that sets forth the facts of the case and asks this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).)

After examining the record, we modify the judgment to vacate the \$200 fine and direct correction of the probation order to delete that fine as well as the \$3,000 probation supervision cost. In all other respects, the judgment is affirmed.

I. BACKGROUND

In August 2013, while executing a search warrant at defendant's home, law enforcement discovered photographs of naked children, and thumb drives and CDs that contained images of naked children.

A June 2014 criminal complaint charged defendant and a codefendant with several drug crimes and charged defendant with possessing child pornography. (Pen. Code, § 311.11, subd. (a).)¹ Pursuant to section 1538.5, codefendant filed a motion to suppress evidence obtained during the August 2013 search, arguing, inter alia, the search warrant lacked probable cause, law enforcement improperly allowed local media inside the residence during the search, and the affidavit in support of the search warrant application contained "intentional or reckless omissions of facts." Defendant joined the motion.

At the end of a November 2016 hearing, a magistrate denied the motion to suppress and held defendant to answer on the charge of possessing child pornography.

Defendant filed several motions thereafter, but the record reflects no renewal of his suppression motion in the superior court via either a motion pursuant to section 1538.5, subdivision (i), or a motion pursuant to section 995.

In May 2019, defendant pled no contest to possession of child pornography, count 2 of the information. After ruling there was a factual basis for the plea, the trial court accepted it.²

After a brief pause in proceedings, sentencing commenced without the benefit of a probation report. Defense counsel "ask[ed] the [c]ourt to either not impose fines pursuant to [*People v. Dueñas* (2019) 30 Cal.App.5th 1157] or impose fines but stay them pending

¹ Further undesignated statutory references are to the Penal Code.

² The trial court confirmed that defendant understood the rights he was waiving, as articulated in a plea form that defendant signed. Paragraph 63 of the plea form, initialed by defendant, states: "I freely and voluntarily waive my right to appeal."

successful completion of probation,” the trial court having earlier indicated a sentence of formal probation.

The trial court asked the prosecutor, “Do the People take a position on the issues of fines, fees, assessments?” The prosecutor replied, “No, we don’t have any information regarding [defendant’s] ability to pay.” Defense counsel responded that defendant was “presumed indigent by nature of the appointment of the [c]ourt.” The prosecutor replied, “Yeah, I don’t have any information on that to give the [c]ourt.”

The trial court suspended imposition of sentence, and granted defendant five years’ formal probation, a condition of which was 120 days in county jail. The trial court imposed, but stayed, the following fines and fees: (1) a \$300 fine pursuant to section 290.3, pending successful completion of probation; (2) a \$300 restitution fine pursuant to section 1202.4, pending successful completion of probation; (3) a \$300 probation revocation fine pursuant to section 1202.44, stayed on the condition that probation not be revoked;³ a “\$200 fine” of unspecified nature, which the order of probation indicates was pursuant to section 672; (5) a “\$40 conviction assessment”; and (6) a “\$30 court operations assessment.”⁴

The trial court further ordered defendant to “pay for the cost of probation supervision for the entirety of his grant of probation,” which amount would be determined by county probation “on a sliding scale basis, what [defendant’s] ability to

³ The trial court did not state explicitly an amount for this fine, but the amount *had to be the same* as the section 1202.4 restitution fine. (See *People v. Guiffre* (2008) 167 Cal.App.4th 430, 434 [explaining that the revocation fine “must be in the same amount as the section 1202.4[, subdivision](b)”].)

⁴ The transcript of the hearing indicates the trial court inadvertently switched the amounts of the mandatory \$40 court operations assessment (§ 1465.8) and mandatory \$30 criminal conviction assessment (Gov. Code, § 70373). The order of probation correctly reflects the mandatory costs. Accordingly, we need not order correction of the apparent mistake at the oral pronouncement.

pay is.” The trial court emphasized that this cost was “not a condition of probation but recoverable civilly.”

At the end of the sentencing hearing, the trial court inquired whether a motion to suppress had been adjudicated earlier in the case, and, upon learning that one was, told defendant: “[Y]ou have a right to appeal from the judgment and sentence of this [c]ourt and particularly the motion to suppress.”

Defendant filed a notice of appeal, marking the boxes on a form indicating he sought to challenge: (1) the denial of the motion to suppress, (2) the validity of the plea, and (3) an “other basis” for the appeal—“[i]neffective assistance of counsel.” The trial court denied defendant’s request for a certificate of probable cause.

II. DISCUSSION

Appointed counsel filed an opening brief setting forth the facts of the case and asking this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing the opening brief.

Defendant filed a supplemental brief, claiming: (1) entry of the local media into his home during execution of the search warrant violated his Fourth Amendment rights; (2) “no evidence” in the trial court demonstrated that defendant possessed child pornography as defined in section 311.11; (3) the affidavit in support of the search warrant application was deficient, because (a) probable cause was lacking, and (b) the officer/affiant omitted material information, and no hearing was held to investigate the omissions, “despite statements by defense counsel . . . that would suggest the necessity of such a hearing”; and (4) ineffective assistance of trial counsel.⁵

⁵ Defendant also requested new appellate counsel in his supplemental brief but provided no reasons in support of the request. Accordingly, that request is denied.

A. *Bars to Defendant's Claims*

There are several threshold issues that we must consider before we may address the merits of defendant's contentions.

First, the appellate waiver that defendant initialed in his plea form may preclude our review of some or all of his contentions. (See *People v. Cisneros-Ramirez* (2018) 29 Cal.App.5th 393, 399-404 [ruling defendant waived his right to challenge on appeal the denial of a suppression motion and any challenge to the legality of the proceedings, and explaining that "a specific review of the appellate waiver with a defendant is not required where" certain conditions are met].)

Second, to the extent that any of defendant's claims do not fall within the scope of the appellate waiver, some claims are barred by his *failure to renew his suppression motion* in the superior court, after the magistrate denied it, and his failure to obtain a certificate of probable cause. (See *People v. Richardson* (2007) 156 Cal.App.4th 574, 582-585, 594-595 [pursuant to *People v. Lilienthal* (1978) 22 Cal.3d 891, a defendant must raise the search and seizure issue in the superior court—i.e., at some point after the preliminary proceedings before the magistrate—in order to be deemed to have raised that issue at some stage of the proceedings prior to conviction as required for appellate review of the issue under section 1538.5, subdivision (m); and holding that defendant, by choosing the plea and not raising his suppression argument again after it was rejected at the preliminary hearing, had forfeited his right to any further review of the argument]; *id.* at p. 596 ["we are without power to address defendant's ineffective assistance of counsel claim in the absence of a certificate of probable cause, and defendant must pursue any such claim through a petition for writ of habeas corpus"].)

Third, any "[i]ssues concerning the defendant's guilt or innocence are not cognizable on appeal from a [no contest] plea. [Citations.] By admitting guilt a defendant waives an appellate challenge to the sufficiency of the evidence of guilt." (*People v. Voit* (2011) 200 Cal.App.4th 1353,1364.)

Accordingly, we do not reach the merits of any of defendant's claims. His two distinct suppression claims are precluded because he did not renew his suppression motion below. (*People v. Richardson, supra*, 156 Cal.App.4th at pp. 582-585, 594-595.) His claim that there is "no evidence" that he possessed child pornography is precluded because defendant pled no contest to the offense. (*People v. Voit, supra*, 200 Cal.App.4th at pp. 1363-1364.) And the claim of ineffective assistance of counsel is precluded in the absence of a certificate of probable cause. (*Richardson, supra*, at p. 596.)

B. Base Fine and Supervision Costs

Although we reject defendant's claims, after examining the record, we conclude the trial court erred in imposing the \$200 fine, as it was unauthorized, and that the \$3,000 in supervision costs appearing in the probation order was not orally imposed and must be stricken from the written record. We can correct any unauthorized aspects of the sentence. (See *People v. Rivera* (2019) 7 Cal.5th 306, 348-349.)

At sentencing, the trial court imposed but stayed: (1) a \$300 fine pursuant to section 290.3; (2) \$300 restitution fine pursuant to section 1202.4; (3) a \$300 probation revocation fine pursuant to section 1202.44; (4) a "\$200 fine," with the authorizing statute unspecified; (5) a "\$40 conviction assessment"; and (6) a "\$30 court operations assessment."

The order of probation (dated May 14, 2019, the date of the hearing) and a minute order of the hearing (dated May 30, 2019) both indicate that, at sentencing, the trial court ordered defendant to pay \$3,000 as the cost of probation supervision. But the trial court imposed no such cost at sentencing. Rather, the trial court ordered defendant to "meet with Probation to determine . . . his ability to pay" the cost of probation supervision. Therefore, because the trial court did not impose this cost orally at sentencing, we will strike it from the order of probation, without prejudice to imposition of the cost in a separate, valid, order of the trial court. (See *People v. Sanchez* (2019) 38 Cal.App.5th 907, 918-919.)

The \$200 fine, which was noted by the probation order as imposed pursuant to section 672, was improper. Section 672 provides: “Upon a conviction for any crime punishable by imprisonment in any jail or prison, *in relation to which no fine is herein prescribed*, the court may impose a fine on the offender not exceeding . . . ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed.” (Italics added.) Section 672 “is a catchall provision allowing a fine to be imposed for every crime, even if the statute criminalizing the conduct did not specifically authorize a fine. The limiting provision was meant to ensure that a fine pursuant to section 672 would not be imposed if another statute authorized a fine for the offense.” (*People v. Breazell* (2002) 104 Cal.App.4th 298, 304.)

Section 311.11, subdivision (a) permits (but does not require) a fine.⁶ Defendant did not forfeit this issue by failing to object in the trial court because a section 672 fine was unauthorized for his section 311.11 offense. (*People v. Breazell, supra*, 104 Cal.App.4th at pp. 304-305.)

We modify the judgment to vacate the \$200 fine.

Having undertaken an examination of the entire record, we find no other arguable error that would result in a disposition more favorable to defendant.

III. DISPOSITION

The judgment is modified to vacate the \$200 fine. The \$3,000 probation supervision cost currently reflected by the probation order is stricken from that order, without prejudice to imposition of supervision costs in a separate, supported order.

⁶ The statute provides: “Every person who knowingly possesses” child pornography “is guilty of a felony and shall be punished by imprisonment in the state prison, or a county jail for up to one year, *or* by a fine not exceeding two thousand five hundred dollars (\$2,500), *or* by both the fine and imprisonment.” (§ 311.11, subd. (a), italics added.)

The trial court is directed to prepare a corrected order of probation and corrected sentencing minute order reflecting these changes. In all other respects, the matter is affirmed.

/S//
RENNER, J.

We concur:

/S/
MAURO, Acting P. J.

/S/
DUARTE, J.